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INTRODUCTION

The Department of Defense, the Department of Energy, the General Services Administration, the Department of Interior, and the Department of Agriculture ("the federal agencies") understand that the Colorado Attorney General's office plans to find a sponsor to reintroduce legislation similar to SB 00-168. That legislation would require recording of environmental covenants that contain environmental use restrictions for any property that is cleaned to a level less than that required to support unrestricted use. The covenants run with the land and constitute a property right.

The proposed legislation's goal of providing a form of long-term "institutional memory" for institutional controls is a worthy one. Ensuring that land use controls protect public health and the environment is a concern shared by federal agencies authorized by law to conduct environmental cleanup of federal property. As currently drafted, however, the bill does not fully consider the unique situation of the federal government, the clean-up requirements placed on it, and, most importantly, the limitations on federal agencies' ability to dispose of federal property. These issues are discussed in more detail below. We look forward to working with the State to resolve these issues in a manner that meets the State's goals and also takes into account the federal government's special concerns.

THE PROPERTY ACT DOES NOT ALLOW FEDERAL AGENCIES TO DISPOSE OF REAL PROPERTY WITHOUT CASE BY CASE REVIEW BY GSA

Absent specific statutory authority vested in a particular federal agency, the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-493, ("Property Act") grants the General Services Administration ("GSA") the exclusive right to convey federal property rights. There is a limited exception to that general grant of authority in 40 U.S.C. § 319, which allows the head of a federal agency to grant an easement in real property "for a right of way or other purpose" as long as that easement "will not be adverse to the interests of the United States." *Id*.

In previous discussions with the Attorney General's office, the scope of this exception was raised. The Department of Justice Office of Legal Counsel ("OLC") evaluated the scope issue when the Department of Commerce ("Commerce") considered granting a conservation easement to the City of Boulder. The OLC evaluated the legislative history of section 319 as well as rules of statutory construction before concluding that

section 319 allows only "the conveyance of property interests that were recognized by courts as valid and customary easements under the common law existing when the statute was enacted." 17 U.S. Op. Off. Legal Counsel 16 (1993). Since conservation easements existed but were not recognized as "valid or customary easement[s]" in most jurisdictions when the Property Act was enacted in 1949, the OLC concluded that Commerce did not have the authority to grant a conservation easement. In the current situation, the environmental covenant contemplated by the State did not even exist when section 319 was adopted, thus making the proposed environmental covenants even less likely than the Commerce conservation easement to fall within the limited exception created by section 319.

There are two circumstances, other than the limited section 319 exception, where federal agencies do possess GSA's power to convey federal property rights outside of the limited scope of section 319. However, these two exceptions arise only when Congress has directed conveyance of identified property. First, Congress has authorized the Department of Defense ("DoD") to convey specific Base Realignment and Closure ("BRAC") property. Second, Congress sometimes directs conveyance of specifically identified excess federal property, in which case the federal agency on whose "master account" the property is located must act as disposal agent.[1] As discussed below, the issues raised by these types of transferring properties are different from those involved with property that remains in federal ownership.

In summary, usually, for "active/nontransferring" property only GSA can convey the kind of property interest Colorado seeks, and GSA, as noted above, has made it clear that it will not do so except under unusual circumstances. In fact, GSA apparently has ***never*** approved transfer of a property right in nontransferring property. When the property is being conveyed (by GSA, DoD or any other federal agency), however, there is an ability to encumber those conveyances along the lines contemplated by Colorado. (See the discussion about Illinois and California below).

[1] Note that often the federal entity on whose "master account" a property is listed often is not the federal entity that occupies the property. For example, the military often locates its bases on Department of Interior "master account" properties. This master account (or ownership) v. occupant issues raises additional complexities with the State's proposed bill because it means that in addressing environmental covenant issues the State would need to deal with the federal property owner as well as with the actual federal occupant of the land.

CONSTITUTIONAL ISSUES

A. The Supremacy Clause and Sovereign Immunity Prohibit Application of the Proposed Statute to the United States

The Supremacy Clause of the United States Constitution[2] states that federal laws are the "supreme Law of the Land." This has been held to mean that federal activities are not subject to state regulation unless Congress has clearly and unambiguously waived sovereign immunity. *Dept. of Energy v. Ohio*, 503 U.S. 607 (1992). Generally, a waiver of sovereign immunity constitutes the United States' consent to state and/or federal enforcement of state requirements against the United States. *See, United States v. Mitchell*, 445 U.S. 535, 539 (1980). "Absent an express waiver of sovereign immunity, the 'activities of the Federal Government are free from regulation by any state.' " *United States v. New Mexico*, 32 F.3d 494, 497 (10th Cir. 1994) (citation omitted). Any waiver of sovereign immunity "must be unequivocal … [and] must be construed strictly in favor of the sovereign … and not 'enlarge[d] beyond what the language requires' " (citations omitted). *Dept. of Energy v. Ohio,* at 615.[3]

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921, et seq. ("RCRA") waives federal immunity from State "… [substantive and procedural] requirements…, respecting control and abatement of … solid waste or hazardous waste disposal and management." 42 U.S.C. § 6961(a).[4] There is nothing in the RCRA waiver that even

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[2] U.S. Const. Art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

[3] RCRA waiver of sovereign immunity regarding penalties and fines included only coercive, and not punitive penalties and fines, because the language was not clear and unequivocal regarding Congressional intent to waive immunity for punitive penalties. The penalty waiver was subsequently clarified by the Federal Facility Compliance Act of 1992. *See* 106 Stat. 1505.

[4] The full RCRA waiver states:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of **the Federal Government** (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste **shall be subject to, and comply with, all** Federal, **State**,

suggests that it is intended to allow states to "force" disposal of federal property rights, which is what the proposed statute's creation of environmental covenants that run with the land purports to do. We have found no case law holding that the RCRA waiver of sovereign immunity includes state requirements that result in the United States' transfer of its proprietary rights to a state. Thus, if it were enacted, the bill would be unenforceable against the United States.

There is another way in which the proposed bill does not satisfy the requirements of the RCRA waiver. The waiver applies only to "all Federal, State, interstate, and local requirements, . . . [that are applied to the federal government] in the same manner, and to the same extent, as [they are to] any [other] person." 42 U.S.C. § 6961. Thus, the waiver extends only to those elements of a state statute that treat federal and non-federal facilities in the same way. The land use control statute proposed by the Colorado Attorney General's Office would have the effect of prohibiting federal facilities from using the benefits that would accrue to similarly situated private parties. This situation obtains because, as discussed above, federal facilities usually are not empowered to encumber federal property[5] as contemplated by the State in the draft bill, whereas private entities do have that power. Failure to recognize this difference effectively prohibits the federal government from cleaning property to a level that does not support unrestricted use even though that option is available to the private sector and even though such a level of cleanup is implicitly sanctioned by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, as long as the actions taken, including restriction on land use "assure[] protection of human health and the environment." Therefore, the United States would not be treated the same as other parties and, thus, Congress' immunity waiver would not extend to the proposed bill.

> interstate, and local **requirements**, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management **in the same manner, and to the same extent, as any person is subject to such requirements**, including the payment of reasonable service charges.

42 U.S.C. § 6961(a)(emphasis added).

[5] 40 U.S.C. §§ 471-493. See discussion of the Property Act below.

B. State Requirements are Preempted Under the Property Clauses and CERCLA.

The United States is authorized to obtain and regulate its real property pursuant to the Article I and Article IV Property Clauses of the United States Constitution.[6] The Supreme Court has noted "that the Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . . '." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976)(citations omitted.) State law generally governs the use of Federal land obtained pursuant to the Property clauses, but State regulation "cannot affect the title of the United States or interfere with its right of disposal." *Surplus Trading Company v. Cook*, 281 U.S. 647, 650 (1930). The proposed bill would usurp Congressional authority under the Property Clauses of the Constitution and, thus, would be unenforceable against the United States.

Also, state law falling within a given field is preempted when Congress evidences an intent to occupy that field. *See, Freightliner v. Myrick,* 514 U.S. 280 (1995); *California Coastal Commission, et al. v. Granite Rock Company*, 480 U.S. 572, 581 (1987). Federal property on which actions to control or abate solid or hazardous waste management is subject to CERCLA requirements for conveyance of that property to a third party by a Federal agency. 42 U.S.C. § 9620 (h). These property conveyance requirements are applicable to CERCLA hazardous substances, which include hazardous wastes. 42 U.S.C. § 9601 (14). Section 9620 (h) (3) (ii) requires a Federal agency that is conveying property to another person to provide a covenant warranting that all remedial action necessary to protect human health and the environment with respect to any hazardous substance remaining on the property has been taken, and that additional remedial action found to be necessary will be conducted by the United States.

The Congressional findings related to § 9620 (h) transfer requirements make clear that Congress intended to facilitate conveyance and private development of excess Federal real property. *See,* Pub. L. 102-426, § 2. State requirements that amount to disposal of federal property prior to the United States' determination that such property is excess would infringe on this intent and are preempted by the extensive property transfer

[6] "The Congress shall have the Power To … exercise [exclusive legislation] over all Places purchased by the Consent of the Legislature of the State in which the Same shall be …." U.S. Const. art. .I, § 8 cl.17. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting … Property belonging to the United States …." *Id.* art. IV, § 3 cl. 2. Note that the historical distinction between Article I and Article IV property focuses on whether the state has consented to cease its jurisdiction over the acquired Article I property. Thus, an inquiry into the "exclusive jurisdiction", versus the "concurrent jurisdiction" status of any particular federal property is always appropriate when considering the power of the state to regulate federal property.

requirements specified by Congress. The United States remains ultimately liable for any required actions after property conveyance, so it is up to the United States to impose the appropriate covenant requirements, including appropriate covenants for the benefit of the State, at the time of conveyance. For property that remains in the federal inventory, the federal government retains full responsibility for the effectiveness of any land use controls. Moreover, through its enforcement authority, the State has various tools to require the landholding agency to address any threat posed by problems associated with land use controls. Thus, State regulations requiring restrictive covenants that dispose of non-excess federal property are preempted because they would interfere with the United States' title and its right of disposal, and are not authorized by Congress.

OTHER STATES HAVE INCLUDED PROVISIONS IN THEIR LAND USE CONTROL LEGISLATION AND REGULATIONS TO ADDRESS THE ISSUES UNIQUE TO THE FEDERAL GOVERNMENT WHILE ALSO ENSURING THE LONG-TERM INTEGRITY OF LAND USE RESTRICTIONS

States other than Colorado have worked with federal agencies to address the special issues pertaining to property rights and the federal government. Illinois provides one example. Earlier this year, when the Illinois Pollutions Control Board ("IPCB") was considering regulations that would require all entities that do not clean property to a level that supports unrestricted use to deed record "environmental land use restrictions," representatives of GSA and other federal entities provided testimony about the issues unique to the federal government. In response to the federal presentations, IPCB is modifying its proposed rule. Under the revision, when a federal agency lacks legal authority to record land use controls, the agency must enter into a Memorandum of Agreement ("MOA") with the Illinois Environmental Protection Agency. The MOA would describe the land use controls and would control how they would be implemented and maintained. Federal and State agencies have worked on a sample MOA that would serve as a template for the site-specific agreements.

California, known for its strict environmental laws, provides another example. The State currently is drafting regulations for land use covenants which would require those who own property that is not cleaned up to a level that supports unrestricted use to execute and record a land use covenant imposing limitations on land use. Those draft regulations include an exception for federal property where "it is not feasible to record a land use covenant." The draft regulations require the federal government to "use other mechanisms to ensure future land use will be compatible with the levels of hazardous" substances that remain on the property. Proposed regulations: Title 22, California Code of Regulations, Chapter 39 Section 67391.1(f). The other mechanisms employed to ensure the integrity of land use controls and future use consistent with those controls include base masterplans, physical monuments and memoranda of

agreement between the federal facility and the Department of Toxic Substances Control ("DTSC"). The proposed regulations are based, in part, on a land use control agreement between DTSC and the Department of the Navy.

CONCLUSION

We encourage the State to work with us to address our shared concerns about the long-term integrity and effectiveness of land use controls. We believe that there is alternative language that we could incorporate into the proposed bill and that there are other solutions, such as an MOA, that would address our mutual concerns. We propose a meeting to discuss this further and suggest any of the following dates and times: 9 on December 12, 10 on December 19, or anytime in the afternoon of December 20. Diane Connolly will call to you see which time would work best for you.

Attachments:

1) GSA 2 page memo from 1998 (by fax)

2) Illinois MOA (attachment to e-mail to which this memo is attached)

3) OLC opinion re: Commerce & conservation easement (section 319 authority) (by fax)